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CHAPTER 7

International Organizations

A. UNITED NATIONS

1. UN Reform

Adoption of Fifth Committee resolutions on UN reform

On April 12, 2013, the United States welcomed the progress at the Fifth Committee of the UN General Assembly on several reform initiatives it had championed over the years. The State Department issued a fact sheet, excerpted below and available at *http://usun.state.gov/briefing/statements/207456.htm*, summarizing the Fifth Committee resolutions adopted by the General Assembly. Ambassador Joseph M. Torsella, U.S. Representative to the UN for UN Management and Reform, provided a statement on April 12, 2013 on the adoption by the General Assembly of key Fifth Committee resolutions on UN reform. His statement (not excerpted herein) is available at *http://usun.state.gov/briefing/statements/207455.htm.*

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… The agreement adopted today does the following:

Agrees to make all of the internal audit reports of the UN Office of Internal Oversight Services (OIOS) publicly available online beginning later this year. The United States has been a major advocate for OIOS and has worked for years for the audit reports the UN watchdog produces to be available to the citizens of the countries the member states represent. The decision by member states to authorize public disclosure of OIOS reports, on a trial basis, through December 2014 is a landmark victory for transparency and accountability, and should become a permanent fixture at the United Nations. Taxpayers and citizens around the world are demanding of their governments more transparency and accountability and this decision helps ensure the United Nations itself maintains the standards it helps promote around the world.

Adopts most of the Secretary General's air travel reform proposals and more. Member states acted on the Secretary General's proposals to address the UN's ballooning air travel expenditures, a significant part of the overall UN travel budget that reached three-quarters of a billion dollars last biennium. …

Embraces much needed human resources reform, including advancement of whistleblower protections. Among the critical actions taken today:

• Commissioning a comprehensive review of the UN compensation package and the methodology used to determine it so that the United Nations can continue to attract and retain high-quality staff while at the same making sure that staff-related costs—a major contributing factor in the UN's dramatic budget growth over the last 10 years—are sustainable.

• Authorizing the Secretary-General to continue planning his staff mobility policy, which would give him the flexibility to move staff and to execute important UN mandates.

• Reaffirming the importance of communication between UN management and staff on staff welfare issues while rejecting the need for "consensus" between them, which has negative implications for accountability and sound decision-making at the UN.

• Requesting the Secretary-General to report annually on the impact of increases in UN staff compensation on the financial situation facing UN organizations. These increases are a primary reason budgets across the UN system continue to be squeezed.

• Directing the Secretary-General to expedite the development of stronger whistleblower protections. The United States is committed to ensuring that those who come forward to report misconduct, fraud, and abuse are fully protected from retaliation.

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2. UN Women

On June 25, 2013, Teri Robl, U.S. Deputy Representative to ECOSOC, addressed the UN Women Executive Board in New York. Ms. Robl's remarks are excerpted below and are available at *http://usun.state.gov/briefing/statements/211161.htm*. For background on UN Women, see *Digest 2010* at 323-24.

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My delegation would first like to applaud the fact that after just two years of operation, UN Women has become a global leader for gender equality and women's empowerment. Experience and a growing body of research demonstrate that when the rights of women and girls around the world advance, so do global peace and prosperity. Investing in women and girls is one of the most powerful forces for international development. Gains in women's employment, health, and education spur economic growth and social cohesion; integrating women's perspectives into peace and security efforts strengthens conflict prevention and makes peace agreements more durable; and when women and men are equally empowered as political and social actors, governments are more representative and effective.

UN Women's leadership role is vital across the UN system. UN Women's proactive involvement was essential to the successful conclusion of the March 2013 Commission on the Status of Women, where the personal involvement of the Executive Director and her team helped member states reach agreement on Conclusions regarding the prevention and elimination of all forms of violence against women and girls. At the General Assembly last year, UN Women's efforts helped pave the way for gender-related language in key resolutions, and at the Rio+20 Conference, UN Women's advocacy was instrumental in gaining support for an outcome that recognized the importance of gender equality.

The UN does critical work on behalf of women and girls that takes place in the field, and UN Women has made its presence increasingly felt on the ground throughout the world. We are pleased that over the past year UN Women has increased its impact, including through hands-on engagement in over 70 countries. We urge UN Women to continue to expand its work with civil society organizations, including groups advocating for women's rights, men and boys committed to advancing gender equality, religious and community leaders, and the private sector.

We support UN Women's focus on five fundamental priorities outlined in the current Strategic Plan: leadership and political participation, economic empowerment, violence against women and girls, peace and security, and national planning and budgeting. With regard to violence against women and girls, we hope UN Women will continue to lead the UN system in working with member states to implement CSW's Agreed Conclusions. We must work together to stop violence directed at women due to their sexual orientation or gender identity, violence against women and girls in all intimate partner relationships, including outside formal marriage, and the link between violence against women and sexual and reproductive health and reproductive rights. Harmful traditional practices such as female genital mutilation/cutting and early or forced marriage must also continue to be addressed.

The United States applauds the new Strategic Plan's increased focus on gender in the context of humanitarian response, including in post-conflict situations. Humanitarian crises exact a heavy toll on women and girls, and all too often gender is not mainstreamed in humanitarian response. We urge UN Women to continue to work across the UN system to ensure that planning for and responding to humanitarian crises addresses the unique effects on women and girls, and ensures increased female participation in planning and response.

We are pleased that UN Women has finalized its regional architecture and put in place the foundations for a new field structure. We urge UN Women to fill field positions with strong and proven leaders who can ensure that UN Women's support, expertise and services get to those who need them most. This will require dedicated effort to ensure that other UN agencies meaningfully integrate gender equality and women's empowerment into programs and policies across all of their work. Given UN Women's role as the hub of coordination across the UN system and with governments, civil society, and other stakeholders, it will also require field leaders who are committed to and excel at coordination with wider stakeholders.

The United States welcomes UN Women's commitment to accountability and enhanced transparency and, in this regard, welcomes the implementation of its decision to disclose internal audit reports publicly. We note that UN Women has allocated additional resources to its audit work, and we support this continued strengthening of the agency's audit and evaluation capacities.

We are concerned that mandatory and non-discretionary costs are rising at a faster rate than contributions. We look forward to discussing how best to ensure that UN Women's critical programmatic activities continue to receive adequate funding.

We are grateful that UN Women has pledged to share best practices and help build the capacity of the Equal Futures Partnership, a new multilateral initiative that aims to improve gender equality through new national actions to expand women's economic empowerment and political participation. We look forward to working with UN Women to expand and develop this important initiative.

Finally, we are looking forward to the Secretary General's announcement of the next Executive Director. This role is pivotal to the UN system's leadership and advocacy on behalf of women and girls worldwide.

The United States is committed to continuing our strong collaboration with UN Women and the Executive Board to advance gender equality and women's empowerment worldwide. These goals remain among the highest priorities for the United States and we look forward to working together in the months and years to come.

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B. PALESTINIAN MEMBERSHIP IN INTERNATIONAL ORGANIZATIONS

Loss of U.S. Vote at UNESCO

On November 8, 2013, the United States lost its vote in the UN Educational, Scientific, and Cultural Organization ("UNESCO") General Conference as a result of legislative restrictions on payment of U.S. dues to UNESCO that were triggered after UNESCO's members voted to grant the Palestinians membership as a state in 2011. See *Digest 2011* at 254-56. The State Department issued a press statement, available at *www.state.gov/r/pa/prs/ps/2013/11/217366.htm*, expressing regret at the loss of a vote while also explaining the ongoing role the United States will have at UNESCO. The press statement includes the following:

> We note a loss of vote in the General Conference is not a loss of U.S. membership. The United States intends to continue its engagement with UNESCO in every possible way—we can attend meetings and participate in debate, and we will maintain our seat and vote as an elected member of the Executive Board until 2015.
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> UNESCO and U.S. leadership at UNESCO matter. UNESCO directly advances U.S. interests in supporting girls' and women's education, facilitating important scientific research, promoting tolerance, protecting and preserving the world's natural and cultural heritage, supporting freedom of the press, and much more. It is in that vein that President Obama has requested legislative authority to allow the United States to continue to pay its dues to UN agencies that admit the Palestinians as a member state when doing so is in the U.S. national interest. Although that proposal has not yet been enacted by Congress, the President remains committed to that goal.

U.S. Ambassador to the UN Samantha Power also delivered a statement on behalf of the United States at the UN on November 8 regarding the loss of a U.S. vote at UNESCO, available at *http://usun.state.gov/briefing/statements/217394.htm*, which follows:

> Today the United States lost its vote in the United Nations Educational, Scientific and Cultural Organization (UNESCO) General Conference as a result of legislative restrictions that prohibit the U.S. from paying its dues. While these restrictions are motivated by concerns that we share, the loss of the United States' vote in UNESCO diminishes our influence within an organization that is looked to around the world for leadership on issues of importance to our country, including the rights of women and girls, Internet governance, freedom of the press, and the recognition and protection of cultural heritage. The Obama Administration has called upon Congress to approve legislative changes that would allow needed flexibility in the application of these statutory restrictions.
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> U.S. leadership in UNESCO matters. As such, the United States will remain engaged with the organization in every possible capacity, including attending meetings, participating in debates, and maintaining our seat as an elected member of the Executive Board until 2015.

U.S. Ambassador to UNESCO David Killion also delivered a statement regarding the loss of a U.S. vote at UNESCO on November 9, 2013 at the 37th UNESCO General Conference. His statement follows and is also available at *http://unesco.usmission.gov/37gc-voteloss.html*.

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I would like to thank you, Director-General Bokova, for your strong, moving and eloquent statement of support for the relationship between the United States and UNESCO. At this important moment in UNESCO's history, I would like to respond briefly on behalf of the United States.

As I noted in my national remarks to the plenary yesterday evening, the deep and continued engagement of the United States in UNESCO will be maintained.

UNESCO matters to the United States. It is at the forefront of facing global challenges and improving the lives of people all around the world. The United States recognizes that UNESCO is a critical partner in creating a better future. We intend to continue our engagement with UNESCO in every possible way. We will actively participate in meetings and debates and we will maintain our seat and vote as an elected member of the Executive Board until 2015. We will also continue to work with the Secretariat and partner delegations on programs of mutual importance, such as girls' and women's education, protection of cultural heritage, leveraging public-private partnerships, and freedom of expression.

The United States is at the table here. Just as we were present for UNESCO's founding 68 years ago, the United States remains as committed to UNESCO's mandate and purpose today.

For this reason, President Obama, Secretary Clinton, Secretary Kerry, myself, and other officials at every level have been working tirelessly to seek a legislative remedy that would allow the United States to resume paying our contributions to UNESCO. Regrettably, that remedy has not yet been achieved. Nonetheless, the administration will continue its efforts to restore our funding for UNESCO.

Madame Director-General, on behalf of the United States, I also want to express my heartfelt thanks to you for your friendship and your steadfast leadership. We have worked together for several years on important issues at UNESCO. Ironically, during the course of this challenging period, your engagement and your leadership have dramatically enhanced the visibility and credibility of UNESCO in the United States as an indispensable agency tackling 21st century global challenges.

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C. INTERNATIONAL COURT OF JUSTICE

On March 29, 2013, the State Department issued a press statement expressing the United States' strong support for the candidacy of Judge Joan E. Donoghue for re-election to the International Court of Justice in 2014. The statement is available at *www.state.gov/r/pa/prs/ps/2013/03/206812.htm* and includes the following:

> Judge Donoghue has served with distinction as an ICJ judge since her election by the United Nations Security Council and the United Nations General Assembly on September 9, 2010 to complete the term of Judge Thomas Buergenthal. Before joining the Court, Judge Donoghue had a long and distinguished career in the service of international law including serving as the senior career lawyer at the State Department and teaching at several U.S. law schools.
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> The ICJ is the principal judicial organ of the United Nations and plays a vital role in the development of international law, in dispute resolution and in the promotion of the rule of law. Elections to fill judicial vacancies on the ICJ for a term running from 2015 until 2024 will be held during the UN General Assembly session in 2014.

On October 31, 2013, Ambassador Elizabeth Bagley, Senior Advisor for the U.S. Mission to the UN, delivered remarks on the report of the International Court of Justice at the UN in New York. Ambassador Bagley's remarks are available at *http://usun.state.gov/briefing/statements/216244.htm* and are excerpted below.

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We would like to thank President Tomka for his leadership as president of the International Court of Justice, and for his recent report regarding the activities of the Court over the past year. We are struck by the continuing forward momentum of the Court reflected in the report. Over the last year, the Court issued two judgments and six orders, and held hearings open to the public in

four complex cases. In addition, the Court has in its pipeline ten more contentious cases spanning the gamut of issues including border disputes, environmental matters, and the interpretation of treaties among multilateral parties, just to reference a few. Five of the pending cases are between Latin American states, two between European states, one between African states, and one between Asian states, while one is intercontinental in character. Truly, the case load of the Court is global and mirrors the work of the General Assembly itself in this regard.

The International Court of Justice is the principal judicial organ of the United Nations. The preamble of the Charter underscores the determination of its drafters "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained." This goal lies at the core of the Charter system, and in particular the role of the Court. Taking stock today of approximately 70 years of ICJ jurisprudence, it is clear that the Court has made a significant contribution to establishing legal norms and clarifying legal principles in multiple areas of international law.

We see an increased tendency among States—reaffirmed again this past year—to take disputes to the Court and to vigorously advocate on behalf of their interests before the Court. In turn the Court has continued to become more responsive to them in multiple ways, including through measures to enhance its efficiency to cope in a timely way with the increase in its workload, and its commitment to continually review and refine its procedures and working methods to keep pace with the rapidly changing times. By working to resolve some disputes up front, helping to diffuse other disputes before those conflicts escalate, and providing a trusted channel for states to address and resolve disputes about legal issues, the Court is fulfilling its Chapter XIV mandate. We hope the Court will continue to receive appropriate resources for carrying out its important functions.

We also want to commend the Court's continued public outreach to educate key sectors of society—law professors and students; judicial officials and government officials; and the general public—on the work of the Court and to increase understanding of the ICJ's work. From a transparency standpoint, we note, in particular, that the Court's recordings are now available to watch live and on demand on UN Web TV. All these efforts complement and expand the efforts of the United Nations to promote the rule of law globally and promote a better understanding of public international law.

In closing, we want to express our appreciation for the hard work of President Tomka, the other judges who currently serve on the Court and all of the members of the ICJ staff who contribute on a daily basis to the continuing productive work of that institution.

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D. INTERNATIONAL LAW COMMISSION

1. ILC's Work on Subsequent Agreements and Subsequent Practice in Treaty Interpretation and Immunity of State Officials from Foreign Criminal Jurisdiction

On October 28, 2013, U.S. Department of State Acting Legal Adviser Mary McLeod delivered a statement at a UN General Assembly Sixth Committee session on the report of the International Law Commission ("ILC") on the work of its 63rd and 65th sessions. Ms. McLeod's remarks, excerpted below (with footnotes omitted) and available in full at

http://usun.state.gov/briefing/statements/215964.htm, provide U.S. comments on the topics presented by the ILC's report.

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Mr. Chairman, I appreciate the opportunity to comment on the topics that are currently before the committee and will in these remarks address the issues of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "immunity of state officials from foreign criminal jurisdiction," as well as provide a few comments on chapter 12 of the Commission's report regarding other decisions and conclusions.

On the subject of "Subsequent agreements and subsequent practice in relation to the interpretation of treaties," we would like to thank the Special Rapporteur, Professor Georg Nolte, for his extensive and valuable work in producing his first report as Special Rapporteur for this topic, and to commend the Commission for its rapid consideration of draft conclusions in the drafting committee during its session earlier this year. The United States continues to believe that there is a great deal of useful work to be done on this subject, and thus welcomes the more specific focus that this topic has taken on.

In reviewing the Special Rapporteur's report and the draft conclusions adopted by the Commission, the United States welcomes in particular the emphasis on preserving and highlighting established methods of treaty interpretation under Article 31 of the Vienna Convention, and situating subsequent agreements and subsequent practice in that framework.

We also welcome the increasing acknowledgment in the draft conclusions and commentary of the limits of subsequent agreement and subsequent practice as interpretive tools vis-à-vis the reasonable scope of the treaty terms being interpreted. For example, subsequent agreements and subsequent practice should not substitute for amending an agreement when appropriate.

In draft conclusion number 3, we note some concern at the term "presumed intent." While discerning the intent of the parties is the broad purpose in treaty interpretation, that purpose is served through the specific means of treaty interpretation set forth in Articles 31-32. In other words, intent is discerned by applying the approach set out in Articles 31-32, not through an independent inquiry into intent and certainly not into presumed intent. The text of conclusion 3 does not seem to capture this important distinction.

Mr. Chairman, turning to the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction," we commend Concepción Escobar Hernández of Spain, the ILC's Special Rapporteur, for the progress she has made on this important and difficult topic. We appreciate the efforts that Professor Escobar Hernández has made to build on the work that Roman Kolodkin, the former Special Rapporteur, had done, and her foresight in planning out the work that remains to be done. We commend also the thoughtful contributions by the members of the ILC.

Under the stewardship of Professor Escobar Hernández, the ILC has produced three draft articles addressing the scope of the topic and immunity *ratione personae*, as well as commentary on those articles. Accordingly, we are pleased that there is now visible progress that has been built on the extensive effort that went into laying a foundation.

One of the challenges of this topic as it relates to immunity *ratione personae* has to do with the small number of criminal cases brought against foreign officials, and particularly against

heads of State, heads of government, and foreign ministers. The federal government of the United States has never brought a criminal case against a sitting foreign head of state, head of government, or foreign minister. Nor are we aware of a state government within the U.S. having brought such a case.

The bulk of U.S. practice on foreign official immunity centers on civil suits. For our purposes, perhaps the most critical difference between civil and criminal jurisdiction in the United States is that civil suits are generally brought by private parties, without any involvement by the executive branch; criminal cases are always brought by the executive branch. We realize that procedures differ in other countries, including those in which criminal investigations are conducted by members of the judicial branch and/or initiated by private party complaints. Of course, it is the sovereign that is concerned with reciprocity, whereas the private parties who bring civil suits are not. When the issue of immunity does arise in the criminal context, and decisions regarding prosecution are made within the executive branch, the application of immunity or of related policy concerns about bringing a prosecution of a sitting head of state may not be publicly apparent because they are considered and resolved within the executive branch as part of the initial decision whether to proceed. Thus, the deferral of prosecution of sitting heads of state may not be a matter of public record, which may make it more difficult to elicit the governing rules.

The United States believes that scope of the topic and immunity *ratione personae* were prudent issues with which to begin, and that the draft articles and commentary may help produce momentum to deal with issues of greater controversy such as immunity *ratione materiae* and exceptions to immunity, as may be appropriate. With respect to scope, because the rules that govern immunity in civil cases differ from those in criminal cases, we suggest that the commentary clarify that the draft articles have no bearing on any immunity that may exist with respect to civil jurisdiction.

The precise definition of the concept of "exercise of criminal jurisdiction" has been left to further commentary. The existing commentary, to Article 1, paragraph 5, explains that the exercise of criminal jurisdiction should be understood to mean "the set of acts linked to judicial processes whose purpose is to determine the criminal responsibility of an individual, including coercive acts that can be carried out against persons enjoying immunity in this context." It is unclear why the exercise of criminal jurisdiction should be limited to those that are linked to judicial processes. In the US, there are limited instances in which the executive branch can apply the police powers without the prior involvement of the judicial branch, for example, arrest and limited periods of detention that can be lawfully undertaken by police authorities with respect to crimes committed in their presence or when necessitated by public safety. We view such application of the police powers as constituting the exercise of criminal jurisdiction, and believe that the commentary to Article 1 should make this clear. Any immunity that exists from the exercise of criminal jurisdiction should not depend on the branch of government that applies the coercion, or the stage of the process at which that coercion is applied. As stated by the International Court of Justice in *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, "the determining factor in assessing whether or not there has been an attack on the immunity of the Head of State lies in the subjection of the latter to a constraining act of authority." It follows that the types of exercise of criminal jurisdiction as to which a head of state, or other member of the troika, may enjoy immunity are those that are coercive, regardless of the branch of government applying the coercion.

Another issue with respect to immunity *ratione personae* that would benefit from clarification in draft Article 4 is whether members of the troika can be compelled to testify in a criminal case in which they are not the defendants. The citation to *Djibouti v. France* in paragraph 3 of the commentary to draft Article 3 would imply that the answer is no, as the I.C.J. ruled in that case that because France had issued a mere request to the president of Djibouti to testify, it did not violate his immunity. The implication of that ruling is that an order compelling the head of state's testimony would have violated his immunity. The commentary should make it clear that the immunity of the troika from compelled testimony does not arise only in cases in which a member of the troika is a defendant or the target of an investigation.

We look forward to working with Professor Escobar Hernández and with the Commission on this important and complex topic.

Mr. Chairman, with respect to other decisions and conclusions of the Commission, let me make brief remarks about two additional topics. First, Mr. Chairman, we wish to express our disappointment that the topic of "Protection of the Atmosphere" has been moved onto the Commission's active agenda, in light of the concerns we expressed about this topic last year. The Commission's understandings limiting the scope of this topic are very welcome, but even with them, the United States continues to believe that this is not a worthwhile topic for the Commission to address, as various long-standing instruments already provide sufficient general guidance to states in their development, refinement, and implementation of treaty regimes. We do not see value in the Commission pursuing this matter, and we will pay close attention to developments on this topic.

Second, Mr. Chairman, the United States welcomes the Commission's addition of the topic "crimes against humanity" to its long-term work program. As the description of this topic noted, the codification of other serious international crimes in widely adopted multilateral treaties—such as the codification of genocide in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide—has been a valuable contribution to international law. Because crimes against humanity have been perpetrated in various places around the world, the United States believes that careful consideration and discussion of draft articles for a convention on the prevention and punishment of crimes against humanity could also be valuable. This topic's importance is matched by the difficulty of some of the legal issues that it implicates, and we expect these issues will be thoroughly discussed and carefully considered in light of states' views as this process moves forward.

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2. ILC's Work on Reservations to Treaties

On October 30, 2013, Assistant Legal Adviser Todd Buchwald delivered U.S. remarks on the report of the ILC on its work on reservations to treaties. Mr. Buchwald's remarks appear below and are also available at http://usun.state.gov/briefing/statements/216136.htm.

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Mr. Chairman, once again, I would like to thank the Chairman of the Commission, Mr. Bernd Niehaus, for his introduction of the Commission's report and for the Commission's completion in 2011 of the Guide to Practice on Reservations to Treaties and commentaries thereto.

Particular gratitude is due to Professor Pellet, who devoted countless hours and considerable expertise to this project; he is commended for bringing this work to a conclusion after so many years. The Guide provides helpful and detailed pointers for the practice related to treaty reservations and can be a valuable reference for practitioners. We also find Professor Pellet's introduction to the Guide to be particularly helpful in detailing the Guide's intended purpose and relationship to law. In this connection, we note the Commission's longstanding consensus that the Guide is not intended to replace or amend the Vienna Conventions. The Guide is not a legally binding text and does not authoritatively interpret the Vienna Convention. Indeed, some passages are simply recommendations for good practice, which is consistent with the Guide's overarching purpose of providing practical solutions for the sometimes complicated questions that arise in this area.

We also note that though the Guide at times reflects obligations that are otherwise established via treaty or custom as law, it does not always reflect consistent state practice or settled consensus on certain important questions, as we have indicated in our prior statements on this topic. For example, state practice on the consequences of an invalid reservation remains quite varied and, as a result, section 4.5.3—one of the more controversial elements of the Guide—in particular, should not be understood to reflect existing law. Moreover, the approach articulated in that section should not be regarded as a desirable rule, since it cannot be reconciled with the fundamental principle of treaty law that a state should only be bound to the extent it expressly accepts a treaty obligation. If a state objects to another state's reservation as invalid, the objecting state can decide to either accept treaty relations notwithstanding its objection, or it can decide not to accept treaty relations. The reserving state, however, cannot be bound without its consent to a treaty without the benefit of its reservation.

The Commission has recommended the establishment of a "reservations dialogue," and that the General Assembly consider establishing an "observatory" on treaty reservations within the Sixth Committee, as well as a "reservations assistance mechanism."

The United States supports a robust "reservations dialogue" and welcomes the useful practices outlined in the Commission's recommendation, which can help encourage clarity about the meaning and intent behind reservations and objections thereto. We note in particular that the reservations dialogue is not a singular or rigid process, but rather a set of basic recommended practices and principles that can improve reservations practice.

The "observatory" on treaty reservations is an interesting proposal. However, we would need to reflect further on any proposed details before we express a view as to whether it is appropriate to establish such a body within the Sixth Committee.

With regard to the "reservations assistance mechanism," the United States is following this proposal with interest. In general, we question whether an independent mechanism, consisting of a limited number of experts that would meet to consider problems related to reservations, is appropriate to inject into a process that fundamentally is to take place between and among states. Further, we are concerned about any implication that the proposals resulting from the mechanism could be seen as compulsory on the states requesting assistance.

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3. ILC's Work on Protection of Persons in the Event of Disasters and Other Topics

On November 4, 2013, Mark Simonoff, Minister Counselor for Legal Affairs at the U.S. Mission to the UN, delivered remarks on the work of the ILC at its 63rd and 65th sessions. Mr. Simonoff addressed the work of the ILC on several topics, including "Protection of Persons in the Event of Disaster," "Identification of Customary International Law," "Provisional Application of Treaties," "Protection of the Environment in Relation to Armed Conflicts," "The Obligation to Extradite or Prosecute," and "Most-Favored-Nation Clause." Mr. Simonoff's remarks are excerpted below and are available in full at *http://usun.state.gov/briefing/statements/216241.htm*.

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We appreciate the Commission's continued work on Draft Article 12, addressing "Offers of Assistance," and in particular the recognition in the commentary that offers of assistance are "essentially voluntary and should not be construed as recognition of the existence of a legal duty to assist." We also value the commentary's affirmation that offers of assistance made in accordance with the present draft articles may not be discriminatory in nature, and that offers of assistance in accordance with the draft articles cannot be regarded as interference in the affected state's internal affairs.

We believe additional consideration is merited, however, of the distinction in this draft article between the relative prerogatives of assisting actors. Draft Article 12 provides that states, the United Nations, and other competent intergovernmental organizations have the "right" to offer assistance, whereas relevant non-governmental organizations "may" also offer assistance. The commentary suggests this different wording was used for reasons of emphasis, in order to stress that states, the United Nations, and intergovernmental organizations are not only entitled but encouraged to make offers of assistance, while non-governmental organizations have a different nature and legal status. We suggest eliminating the distinction and providing instead that states, the United Nations, intergovernmental organizations, and non-governmental organizations "may" offer assistance to the affected State, in accordance with international law and applicable domestic laws. While there is no doubt that states, the United Nations, and intergovernmental organizations have a different nature and legal status than that of non-governmental organizations, that fact does not affect the capacity of non-governmental organizations to offer assistance to an affected state, in accordance with applicable law. The United States also believes that non-governmental organizations should be encouraged—like states, the United Nations, and competent intergovernmental organizations—to make offers of assistance to affected states, in accordance with applicable law.

More generally, we remain concerned with an overall approach to the topic that appears to be based on legal "rights" and "obligations." We would continue to emphasize our view that the Commission could best contribute in this area not by focusing on legal rights and duties, but by providing practical guidance to countries in need of, or providing, disaster relief.

For example, although the United States greatly values individual and multilateral measures by states to reduce the risk of disasters, and we have implemented such measures domestically, we do not accept the assertion in Draft Article 16 that each state has an obligation

under international law to take the necessary and appropriate measures to prevent, mitigate, and prepare for disasters. The voluminous information gathered by the Commission describing national and international efforts to reduce the risk of disasters is impressive and valuable, but we do not believe that such information establishes widespread state practice undertaken out of a sense of legal obligation; rather, national laws are adopted for national reasons and the relevant international instruments typically are not legally binding. As such, there is no basis to conclude that this is a rule of customary international law. To the extent this article reflects progressive development of the law, it ought to be identified as such in the commentary to this article. Moreover, we question the practical impact of such a rule considering that it would be up to each state to determine what risk reduction measures are necessary and appropriate. Finally, the draft article should be re-titled "Reduction of risk of disasters," to align it with similar articles such as draft articles 14 ("Facilitation of external assistance") and 15 ("Termination of external assistance").

We have similar concerns regarding Draft Article 14, though we commend the Commission and the rapporteur for their work on the draft article in other respects, including the emphasis it places on the importance of the affected state taking the necessary measures within its national law to facilitate the prompt and effective provision of external assistance regarding relief personnel, goods, and equipment—in particular, among other things, with respect to customs requirements, taxation and tariffs. Such steps can address a major and avoidable obstacle to effective assistance. Indeed, while we agree with the idea that it is generally beneficial for an affected state to take steps to exempt external disaster-related assistance goods and equipment from tariffs and taxes in order to reduce costs and prevent delay of goods, we would suggest eliminating the notion in the commentary that might encourage states as an alternative to lessen such tariffs and taxes. Along similar lines the draft article contains an illustrative list of measures for facilitating the prompt and effective provision of external assistance; without prejudice to our views about whether the article should be framed as being based on legal rights and obligations, we suggest adding to that list measures providing for the efficient and appropriate withdrawal and exit of relief personnel, goods and equipment upon termination of external assistance. States and other assisting actors may be more likely to offer assistance if they are confident that, when the job is done, their personnel, goods and equipment will be able to exit without unnecessary obstacles.

Mr. Chairman, with respect to the topic "Identification of Customary International Law," the United States extends our compliments to Sir Michael Wood for his excellent work on the topic in his first report as special rapporteur. Mr. Wood's initial Note on this topic set forth an excellent road map for how the Commission might tackle this issue and highlights that there are still many unsettled questions in this area that could benefit from the attention of states and the Commission.

Mr. Wood's report this year provides an important review of relevant authority in this area, in particular regarding relevant decisions from international courts and tribunals. This will serve as a valuable foundation as the work on the topic moves ahead. The report also highlights the difficulty of analyzing state practice due to the paucity of publicly available materials. We believe that state practice is a critical ingredient to the Commission's work in this area, and would hope to see it play a larger role as this topic progresses. To that end, as we have stated previously, we are reviewing United States practice with respect to the formation and development of customary international law with a view to providing materials that may be

useful to the Commission, and we anticipate being able to respond by the requested deadline in January 2014.

The report canvassed a diverse array of views on questions related to the formation and evidence of customary international law. Recognizing that the work is in its early stages and that covering all viewpoints provides an important foundation for the work to progress, we hope that, ultimately, such diversity will not obscure areas that should be clear, such as the importance of both state practice and *opinio juris* in the formation of customary international law.

With respect to the inclusion of *jus cogens*, we agree with the special rapporteur that it is better not to deal with that issue as part of the current topic.

In general, we echo the observation in Mr. Wood's initial report that, as work on this topic proceeds, it is critically important that the results of the Commission's work not be overly prescriptive.

Once again, we commend Mr. Wood for his work on this topic thus far, and welcome its further elaboration according to the plan established in his initial note.

Mr. Chairman, turning to the topic, "Provisional Application of Treaties," the United States thanks Mr. Juan Manuel Gómez-Robledo for his first report.

The work on this topic appears to be at an early stage. As such, we can offer general reactions in anticipation of more detailed interaction as the Commission's work evolves. As we have previously noted in discussing this topic, our approach begins with the basic proposition that provisional application means that states agree to apply a treaty, or certain provisions, as legally binding prior to its entry into force, the key distinction being that the obligation to apply the treaty—or provisions—in the period of provisional application can be more easily terminated than is the case after entry into force. We hope that the result of this work is clear on this basic definition.

As we have in the past, the United States urges caution in putting forward any proposal that could create tension with the clear language in Article 25 of the Vienna Convention on the Law of Treaties as it relates to provisional application.

The current report touches on the interaction between domestic law and the international law regarding provisional application. As the special rapporteur notes, domestic law is not, in principle, a bar to provisional application, but it seems equally plain to us that a state's domestic law may indeed determine the circumstances in which provisional application is appropriate for that state. The special rapporteur also alluded to concerns that provisional application may be used to sidestep domestic legal requirements regarding the conclusion of international agreements. The appropriateness of provisional application under a state's domestic law is a question for that state to consider. In this regard, the United States does not agree with the special rapporteur's characterization of the provisional application of a certain maritime boundary treaty mentioned in the report. In our own practice, we examine our ability under domestic law to implement a given provision or agreement pending entry into force before we agree to apply it provisionally, and do so only consistent with our domestic law.

We note the special rapporteur describes the goal of his work on this topic to "encourage" and provide "incentives" for the use of provisional application. This appears to reflect his conclusion that provision application is rarely used, and that this fact suggests that states are "unaware of its potential." In our view, the question of whether states make use of provisional application or not depends on the particular circumstances of a given agreement or situation. For purposes of this report, the frequency of use seems to be a separate and secondary issue compared to clarifying the nature of provisional application and how to make use of it clearly

and effectively. Although bringing additional clarity to this area of the law may indeed result in more frequent use of provisional application, we would urge the special rapporteur to focus on provisional application itself rather than on increasing its use.

The United States congratulates Ms. Marie Jacobsson on her appointment as the special rapporteur for the topic entitled "Protection of the environment in relation to armed conflicts," which has now been included in the ILC's program of work. We recognize the deleterious effects armed conflict has had on the natural environment, and we believe this is an issue of great importance. The U.S. military has long made it a priority to protect the environment not only to ensure the availability of land, water, and airspace needed to sustain military readiness, but also to preserve irreplaceable resources for future generations. Indeed, we reaffirm that protection of the environment during armed conflict is desirable as a matter of policy for a broad range of reasons, including for military, civilian health, and economic welfare-related reasons, in addition to environmental ones as such.

However, we are concerned that this topic encompasses broad and potentially controversial issues that could have ramifications far beyond the topic of environmental protection in relation to armed conflict, such as the issue of concurrent application of bodies of law other than the law of armed conflict during armed conflict. Any effort to come to conclusions about lex specialis in general or the applicability of environmental law in relation to armed conflict in particular—especially in the abstract—is likely to be difficult and controversial among states.

We therefore concur in the special rapporteur's view that this topic is not well-suited to a draft convention and we welcome her decision to focus on identifying existing rules and principles of the law of armed conflict related to the protection of the environment. We anticipate that this review will demonstrate that the law of armed conflict contains a body of rules and principles relevant to environmental protection. For example, under the principle of distinction, parts of the natural environment cannot be made the object of attack unless they constitute military objectives, as traditionally defined, and parts of the natural environment may not be destroyed unless required by military necessity. However, certain treaty provisions related to the protection of the environment during armed conflict have not gained universal acceptance among states either as a matter of treaty law or customary international law. We also note the suggestion that it is "not the task of the Commission to modify . . . existing legal regimes," in particular the law of war. We urge the ILC to continue to take that consideration into account as it continues its work on this topic.

Mr. Chairman, with respect to the topic entitled "The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)," we would like to thank the ILC Working Group for the Report found at Annex A of the ILC 2013 Annual Report for the sixty-fifth session. The report ably recounts the extensive work by the Commission on this topic since its inception in 2006, the diverse array of treaty instruments containing such an obligation, and important developments such as the International Court's 2012 judgment on Questions relating to the Obligation to Prosecute or Extradite. The United States agrees with the working group that "it would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation to extradite or prosecute" (Annex A, para. 18).

Further, while we consider extradite or prosecute provisions to be an integral and vital aspect of our collective efforts to deny terrorists a safe haven, and to fight impunity for such crimes as genocide, war crimes and torture, there is no obligation under customary international law to extradite or prosecute individuals for offenses not covered by treaties containing such an

obligation. Rather, as the working group notes, any efforts in this area should focus on specific "gaps in the present conventional regime" rather than a broad-based approach (*ibid*., para. 20). Accordingly, we commend the working group for its report, which we think allows the Commission to bring to closure its work on this topic.

As regards the Most-Favored-Nation Clause topic, we appreciate the extensive research and analysis undertaken by the study group, and wish to recognize Donald McRae in particular for his stewardship of this project as chair of the study group, Mathias Forteau for his service as chairman in Professor McRae's absence, as well as the other members of the Commission who have made important contributions in helping to illuminate the underlying issues.

We support the study group's decision not to prepare new draft articles or to revise the 1978 draft articles. MFN provisions are a product of specific treaty formation and tend to differ considerably in their structure, scope, and language. They also are dependent on other provisions in the specific agreements in which they are located, and thus resist a uniform approach. Given the nature of MFN provisions, we believe that including guidelines and model clauses in the final report risks an overly prescriptive outcome and therefore would not be appropriate. We continue to encourage the study group in its endeavors to study and describe current jurisprudence on questions related to the scope of MFN clauses in the context of dispute resolution. This research can serve as a useful resource for governments and practitioners who have an interest in this area, and we are interested to learn more about what areas beyond trade and investment the study group intends to explore.

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E. OTHER ORGANIZATIONS

1. Organization of American States

a. Election of U.S. Candidate to the Inter-American Commission on Human Rights

On February 21, 2013, the State Department announced the candidacy of Professor James L. Cavallaro of Stanford Law School to serve as a member of the Inter-American Commission on Human Rights ("IACHR") for elections to be held during the June 2013 General Assembly of the Organization of American States (OAS) in Antigua, Guatemala. The media note making the announcement is available at www.state.gov/r/pa/prs/ps/2013/02/205055.htm and explains the importance of the IACHR:

> The independent and autonomous IACHR promotes and defends human rights in all member states of the OAS. It impacts thousands of lives in the hemisphere through the issuance of reports on petitions and cases, as well as recommendations, to OAS member states to improve the human rights' conditions in their countries.
>
> Over the last half century, the IACHR has played a critical role in monitoring and supporting OAS member state adherence to human rights commitments. Its seven Commission members are recognized experts in human

> rights elected in their own right as individuals, not as representatives of governments. Their members' political autonomy and objectivity distinguish the IACHR as a leading human rights body.
>
> The promotion of human rights and fundamental freedoms, as embodied in the American Declaration on the Rights and Duties of Man and the Inter-American Democratic Charter, is a cornerstone of U.S. foreign policy. The United States is pleased to be a strong supporter of the IACHR, and is committed to continuing support for the Commission's work and its independence. Preserving the IACHR's autonomy is a pillar of our human rights policy in the region.

Professor Cavallaro was elected to the Commission at the regular session of the General Assembly of the OAS in June. See State Department press statement, available at *www.state.gov/r/pa/prs/ps/2013/06/210403.htm*.

b. Resolution on Strengthening the Inter-American Human Rights System

At its 44th special session in March 2013, the OAS General Assembly adopted a resolution on strengthening the Inter-American Human Rights System. OEA/Ser.P AG/RES.1 (XLIV-E/13) (Mar.22, 2013). The United States welcomed the resolution in a March 23, 2013 press statement, available at *www.state.gov/r/pa/prs/ps/2013/03/206581.htm*. The press statement explains:

> The independent and respected Inter-American Commission on Human Rights—a founding pillar of the Western Hemisphere's human rights architecture—is stronger and more capable as a result of the decision of all OAS member states to seek full financing for its operations and to strengthen its rapporteurships. As a reflection of our strong support for the Commission's efforts, the United States also announced yesterday a $1 million contribution to support its operational costs, and we encourage other member states to do the same.

For U.S. input on the efforts to strengthen the Inter-American Human Rights System, see *Digest 2012* at 264-67.

2. Organization for Economic Cooperation and Development

On May 30, 2013, the Organization for Economic Cooperation and Development ("OECD") announced that it would be entering into accession discussions with Colombia and Latvia. The U.S. Department of State issued a media note conveying the announcement, available at www.state.gov/r/pa/prs/ps/2013/05/210106.htm. The media note explains:

> The OECD is a multilateral organization that brings together 34 democracies with market economies from the Americas, Europe and the Pacific Rim. Countries

seeking OECD membership must demonstrate like-mindedness, or compatibility, with OECD principles, as well as complete technical reviews of various aspects of their economies.

As new members, Colombia and Latvia would contribute unique perspectives and insight to OECD discussions and policy recommendations.

3. Puerto Rico's Participation in International Organizations

a. Association of Caribbean States

On May 14, 2013, Governor of Puerto Rico Alejandro J. Garcia Padilla wrote to the State Department regarding Puerto Rico's interest in becoming an Observer in the Association of Caribbean States ("ACS"). Acting Assistant Secretary of State for International Organization Affairs H. Dean Pittman responded to Governor Garcia Padilla in an August 9, 2013 letter that is available at *www.state.gov/s/l/c8183.htm*. Excerpts from that letter follow.

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In exploring the possible participation of a U.S. territory in an international organization, we have to consider several factors, including the degree to which the organization is political in nature and involved in issues of foreign policy (as opposed to one focused on technical, social or cultural matters), and the nature and scope of United States participation in the organization.

As you may be aware, the Department of State has previously declined to support participation by Puerto Rico in the ACS. We remain concerned that the ACS is at least in part a political organization that has taken positions incompatible with U.S. foreign policy. Moreover, the United States is not a member or associate member of the ACS and, based on the organization's founding convention, is excluded from membership. In light of these ongoing concerns, we cannot support Puerto Rico's request to participate in the ACS as an Observer.

As you know, the United States remains committed to working with countries in the Caribbean to address common concerns, and we continue to work closely with other organizations in the region, including the Caribbean Community and the Organization of American States. Please be assured of our continuing commitment to working with you and your government to advance U.S. interests in the region.

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b. Ibero-American Cultural Congress

The Department of State of Puerto Rico also contacted the U.S. Department of State regarding possible participation in the Ibero-American Cultural Congress to be held in Spain in November 2013. The U.S. response is available at *www.state.gov/s/l/c8183.htm* and includes the following:

> The U.S. Department of State does not object to representatives of Puerto Rico attending the 2013 Cultural Congress, provided that Puerto Rico not attend in the capacity of a member of the Congress or of the Ibero-American Cultural Community, that Puerto Rico not seek or accept to be treated as a sovereign State at the Congress, and that Puerto Rico sign no instruments in connection with the Congress without the prior authorization of the U.S. Department of State.

c. UNESCO

On November 4, 2013, Governor Alejandro García-Padilla of Puerto Rico wrote to Secretary Kerry requesting that the United States apply for Associate Member status for Puerto Rico at UNESCO. The U.S. Department of State responded to the Governor of Puerto Rico in a December 6, 2013 letter, available at *www.state.gov/s/l/c8183.htm*, explaining that the request was not received in time to "engage in the policy and legal analysis that would have been necessary for submission at the 37th plenary session of the UNESCO General Conference." The December 6 letter proposes regularized working-level meetings "to review Puerto Rico's interest in heightened engagement in regional and broader international settings."

> At a recent meeting, representatives of the Commonwealth agreed to provide us with a prioritized list of ten international organizations with which Puerto Rico is most interested in engaging. We believe that regular working-level meetings would provide a good setting to consider this, as well as other possibilities that we or your representatives may identify.

4. Gulf Cooperation Council

On December 16, 2013, President Obama determined the Gulf Cooperation Council to be eligible to receive defense articles and defense services under the Foreign Assistance Act of 1961 and the Arms Export Control Act. The determination was based on the finding "that the furnishing of defense articles and defense services to the Gulf Cooperation Council will strengthen the security of the United States and promote world peace." 78 Fed. Reg. 78,163 (Dec. 24, 2013).

5. International Civil Aviation Organization—Taiwan

On July 12, 2013, President Obama signed into law H.R. 1151, an Act concerning participation of Taiwan in the International Civil Aviation Organization ("ICAO"). Pub. Law No. 113-17. President Obama's statement on signing the legislation, Daily Comp. Pres. Docs., 2013 DCPD No. 00495, p. 1, includes the following:

> The United States fully supports Taiwan's membership in international organizations where statehood is not a requirement for membership and encourages Taiwan's meaningful participation, as appropriate, in organizations where its membership is not possible. My Administration has publicly supported Taiwan's participation at the ICAO and will continue to do so. Consistent with my constitutional authority to conduct foreign affairs, my Administration shall construe the Act to be consistent with the "one China" policy of the United States, which remains unchanged, and shall determine the measures best suited to advance the overall goal of Taiwan's participation in the ICAO. I note that sections 1(b) and 1(c) of the Act contain impermissibly mandatory language purporting to direct the Secretary of State to undertake certain diplomatic initiatives and to report to the Congress on the progress of those initiatives. Consistent with longstanding constitutional practice, my Administration will interpret and implement these sections in a manner that does not interfere with my constitutional authority to conduct diplomacy and to protect the confidentiality of diplomatic communications.

Taiwan was subsequently invited by the president of ICAO to participate in the 38th ICAO Assembly in Montreal from September 24 to October 4, 2013. The September 24, 2013 State Department press statement regarding the invitation, available at *www.state.gov/r/pa/prs/ps/2013/09/214658.htm*, notes, "Taiwan's active participation in this year's Assembly will promote global aviation safety and security, and will strengthen ICAO as an institution."

Cross References

Immunity of the UN, **Chapter 10.E.**
Strengthening the UN Environment Programme ("UNEP"), **Chapter 13.A.3.**
ILC, **Chapter 8.A.**
ILC work on transboundary aquifers, **Chapter 13.C.2.**
Middle East peace process, **Chapter 17.A.**